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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

VICTOR G. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIEL GALLAGHER; COURTNEY B.L. EDWARDS; RONALD WAYNE DABE, ...PETITIONERS

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION, ...RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LANGUAGE OF THE RAILWAY LABOR ACT AT 45 U.S.C. § 152 SEVENTH AND 45 U.S.C. § 156 PROHIBITS DEFENDANTS FROM CHANGING THE RATES OF PAY, RULES, OR WORKING CONDITIONS OF THE PLAINTIFFS CONTRARY TO AND IN VIOLATION OF THE TERMS OF THE EXISTING COLLECTIVE BARGAINING AGREEMENT, AND CONTRARY TO, AND IN VIOLATION OF THE RAILWAY LABOR ACT, AND IF SO, WHETHER THE DECISION OF THE DISTRICT COURT ENTERING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT AGAINST DEFENDANT UNIONS FOR BREACH OF DUTY OF FAIR REPRESENTATION, AND AGAINST DEFENDANT UPS FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT WAS ARBITRARY AND IN ERROR AS A MATTER OF LAW.

II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE COMPANY AND UNION REPRESENTATIVES WERE AUTHORIZED TO CREATE A SIDE AGREEMENT PURPORTING TO INTERPRET A PROVISION OF THE SUPPLEMENTAL AGREEMENT RESOLVED PREVIOUSLY BY A SYSTEM BOARD OF ADJUSTMENT RULING, WITHOUT ADDRESSING THE ISSUE OF WHETHER THE PROCEDURES ENGAGED IN TO EFFECT SUCH CHANGES AND AMENDMENTS ULTIMATELY DID OR DID NOT ABIDE BY THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE PROVISIONS OF THE RAILWAY LABOR ACT, AND A UNION'S DUTY OF FAIR REPRESENTATION.

III. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO APPLY THE CORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

PARTIES

The Petitioners in this Court are Victor G. Grahn, James L. Cooper, Jr., Richard Daniel Gallagher, Courtney B.L. Edwards, Ronald Wayne Dabe, who were the Plaintiffs-Appellants below.

The Respondents in this Court, who were the Defendants-Appellees below, are International Brotherhood of Teamsters Airline Division, Local 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; United Parcel Service Co.; Independent Pilots Association.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i,ii,iii
Parties	iv
Table of Authorities	vii
Official and Unofficial Reports of Opinions in the Case	viii
Jurisdiction	1
Constitutional Provisions, Statutes and Rules Involved in the Case	2
Statement of the Case	3-11
Argument	11-26
I. The District Court Decision Entering Summary Judgment Dismissing Plaintiffs' Complaint Was Arbitrary And In Error As A Matter Of Law Because It Failed To Address The Issue Set Forth In Plaintiffs' Complaint And In The Parties Motions For Summary Judgment	11-14

II.	Plaintiffs Have Presented Material Facts Raising Genuine Issues As To Defendant Teamsters Union's Breach Of Its Duty of Fair Representation.....	15-22
III.	The District Court Did Not Address The Issue Before It But Instead Dismissed Plaintiffs' Complaint Based On An Issue Irrelevant To The Case.....	22-26
Conclusion.....		26
Appendix.....		1a-23a

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)..... 10, 23, 24, 25

Branch 6000 v. NLRB, 595 F.2d 808, (D.C. Cir. 1979)..... 16

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)..... 18

Ratkosky v. United Transportation Union, 843 F.2d 869 (6th Cir. 1988)..... 15, 17, 19

Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975)..... 15, 17

Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967)..... 17, 18

Statutes:

45 U.S.C. § 151..... 2

45 U.S.C. § 151, First..... 4

45 U.S.C. § 151, Fifth..... 3

45 U.S.C. § 152, Seventh..... 2, 11

45 U.S.C. § 156..... 2, 9, 11, 12

Federal Rules Civil Procedure 56 (c) and (e)..... 3

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

1. Victor G. Grahn; James L. Cooper, Jr.; Richard Daniel Gallagher; Courtney B.L. Edwards; Ronald Wayne Dabe v. International Brotherhood of Teamsters Airline Division, Local 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; United Parcel Service Co.; Independent Pilots Association, Civil Action No. C89-0983-L(B) (W.D. Ky., 12/12/89).

2. Victor G. Grahn; James L. Cooper, Jr.; Richard Daniel Gallagher; Courtney B.L. Edwards; Ronald Wayne Dabe v. International Brotherhood of Teamsters Airline Division, Local 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; United Parcel Service Co.; Independent Pilots Association, No. 92-5286 (6th Cir. 1992).

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IN THE

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October Term, 1992

VICTOR G. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIEL GALLAGHER; COURTNEY B.L. EDWARDS; RONALD WAYNE DABE .....PETITIONERS

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION..... RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

The United States Court of Appeals issued its opinion on January 5, 1993, affirming the decision of the United States

District Court. District Court jurisdiction was based on 28 U.S.C. § 1331.

The jurisdiction of this Court to review this Petition for Writ of Certiorari is invoked under Title 28, United States Code, Sections 1254(1) and 2101(c), and Supreme Court Rules 13 and 14.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

This case involves the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"), which provides at § 152, Seventh:

> Seventh. **Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden.** No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS § 156].

Which provides at § 156:

> **Procedure in changing rates of pay, rules, and working conditions.** Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said board has proffered its services, rates of pay, rules, or working

> conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act [45 USCS § 155], by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

This case also involves Fed.R.Civ.P. 56 which holds at paragraphs (c) and (e) that if the adverse parties' response, by affidavits or as otherwise provided in this rule (pleadings, depositions, answers to interrogatories, and admissions on file) sets forth specific facts showing that there is a genuine issue as to any material fact, summary judgment is not appropriate. (Appendix 22a)

STATEMENT OF THE CASE

Plaintiffs are employees as defined in 45 U.S.C. § 151 Fifth and seek injunctive relief, damages, declaratory judgment and other appropriate relief pursuant to the Railway Labor Act, 45 U.S.C. § 151 et seq.

Plaintiffs' underlying Complaint arises out of the Teamsters Union's[1] breach of its duty of fair representation and the company's breach of the collective bargaining agreement. Defendants have changed the working conditions of the Plaintiffs and have changed the language of the collective bargaining agreement depriving Plaintiffs of their rightful seniority status. Plaintiffs allege this was effected in violation of the terms of the collective bargaining agreement, in violation of the provisions of the RLA, and in breach of the unions' duty of fair representation regarding contract changes.

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[1] "Teamsters Union" when used, will refer to Teamsters International, and Teamsters Local 608, collectively.

Plaintiffs are employed as flight crewmembers by Defendant United Parcel Service Co. (UPS Co.) a wholly owned subsidiary of United Parcel Service of America, Inc. (UPS America), a holding and management company. UPS Co. is a carrier within the meaning of the RLA 45 U.S.C. § 151, First.

Until August 24, 1987, when UPS[2] announced its decision to assume operational control of its aircraft, UPS contracted with four contract carriers to provide air crews and maintenance crews for the planes owned by the company and leased to the contract carriers.

Teamsters International, in conjunction with its affiliate, Local 608, acted as representative for the flight crewmembers in negotiating a Collective Bargaining Agreement between the flight crewmembers and the company.[3] Also negotiated at this time, and incorporated in Article 4 of the Supplemental Agreement, was the "Transition Letter of Agreement" to cover, among other issues, special seniority issues during the transition period.[4]

The Transition Letter of Agreement was negotiated to "provide the addition of complete crews to the Crewmembers Seniority List in an orderly manner during the return of aircraft to the Company from contractors."

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[2]"UPS" when used, will refer to UPS America and its wholly owned subsidiaries.

[3]This contract is entitled "Flight Crewmember Supplemental Agreement to the National Master UPS Collective Bargaining Agreement."

[4]The "transition period" refers to the period from August 1987, when UPS first began hiring flight crewmembers, through calendar year 1988.

The Transition Letter of Agreement assures that employees hired from the four contract carriers[5] during the transition period be given a preferential seniority status designated Group I.[6] Paragraph A of the Transition Letter of Agreement states that:

> Group I shall be former Company contractor crewmembers who were flying for a Company contractor on or after September 1, 1987, and also crewmembers who are acquired as a result of a merger with, or acquisition of, another carrier.

The seniority position of Group I flight crewmembers relative to each other is also defined in paragraph A of the Transition Letter of Agreement, as follows:

> Group I crewmembers will be hired in position by status and aircraft type. Group I contractor crewmembers will be positioned on the administrative list by those hired September 1, 1987 and earlier, arranged by date of birth followed by those hired after September 1, 1987, arranged by date of birth.

As defined by the terms and conditions of the Transition Letter of Agreement, each of the Plaintiffs are Group I employees hired by a contract carrier prior to September 1, 1987.

UPS hired its first crewmembers on January 18, 1988. The first seniority list was developed and published in January, 1989, after the transition period had been completed. A thirty-day

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[5]The four contract carriers referred to in the Transition Letter of Agreement are: Evergreen Airlines, Inc.; Interstate Airlines, Inc.; Orion Air; and, Ryan Aviation/PHH Air.

[6]Group II crewmembers are employees hired from sources other than the four contract carriers, and this category is not an issue in the present action.

period was allowed for employees to review and object to the seniority list. According to a memo from William Ferchak, who became Trustee of Teamsters Local 608 in late 1988[7], some eighteen grievances were filed within the thirty-day period alleging violations of Article 4 (Seniority) of the Collective Bargaining Agreement and alleging violations (Seniority) of the Transition Letter of Agreement.

Although Plaintiffs were former contract flight crewmembers with Orion Air, hired and flying for the contract carrier before September 1, 1987, they were incorrectly positioned on the seniority list with those employees hired by the contract carriers after September 1, 1987.

Article 17 of the flight crewmembers Supplemental Agreement states that:

> In compliance with Section 204, Title II of the Railway Labor Act, as amended, is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of this Agreement and any amendment or additions thereto and which are properly submitted to it, which Board shall be known as "United Parcel Service Crewmembers System Board of Adjustment", herein referred to as the "Board."

Pursuant to the terms of the contract, a System Adjustment Board hearing was held in Louisville, Kentucky, in February, 1989 to hear the above-referenced grievances. The 4-0 decision of the February System Adjustment Board interpreted the contract language regarding seniority to mean that:

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[7]Dan Darrow, a Teamster International employee was Trustee prior to Ferchak.

> All crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor prior to September 1, 1987, regardless of the date of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor on or after September 1, 1987. There shall be no retroactive compensation.

A UPS crewmember revised seniority list was issued subsequent to the Board decision reflecting Plaintiffs' correct seniority position in Group I, which positions them before those contract crewmembers hired by the contract carriers after September 1, 1987.

Article 17 of the flight crewmembers Supplemental Agreement clearly states that:

> The Board shall have jurisdiction over all disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement...The Board shall be competent to hear the disputes properly submitted to it and decide said disputes by a majority vote of all members of the Board. Decision of the Board shall be final and binding upon the parties hereto. (Emphasis added)

The February decision of the System Adjustment Board was grieved by employees alleging their seniority was affected by the Board's decision. Although the Board was bound by the terms of the CBA to deny these grievances as without merit, since the February Board decision which interpreted the contract language regarding seniority was final and binding on all parties, a special unannounced June System Board was called by William Ferchak,

Teamster Trustee of Local 608, and by Neil Konietzko, Air Region Labor Relations Manager for UPS, to specifically hear those grievances.[8] After hearing the grievances of those whose seniority was allegedly negatively affected by the February Board decision, the June System Board issued a communication dated June 21, 1989, stating that:

> **This case is referred back to a joint company-union committee for resolution.**

On August 2, 1989, without affording Plaintiffs any hearing, or opportunity to be heard, the company and the union issued an "Agreement" signed by William Ferchak and Neil Konietzko attempting to add new contract terms, and language altering the Collective Bargaining Agreement. As the result of this invalid decision, Plaintiffs were demoted to a new seniority classification arbitrarily entitled "Group I-A," a classification not authorized by the contract or the Transition Letter of Agreement. UPS issued a revised crewmember seniority list on August 2, 1989, simultaneous with the so called "August Agreement", reflecting this confusing, improper and invalid decision.

Subsequent to the "August Agreement", Plaintiffs filed grievances requesting that the Collective Bargaining Agreement/Transition Letter of Agreement, as interpreted by the February System Board, be adhered to and that the arbitrary and invalid "August Agreement" be voided. Plaintiff Grahn's grievance was denied by the company with the curt statement that there was "no contract violation." The union's response to Grahn's grievance was that the grievance was "settled." The union has refused Plaintiff Grahn any meaningful appeal. Further, the

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[8] Ferchak (Teamsters Local 608) and Konietzko (representing UPS) were two of the four System Board members who rendered the unanimous February Board decision which definitively interpreted the contract language regarding seniority. The other two were Lee Wallace, UPS Flight Operations Manager, and Robert Miller, union steward.

union has refused to process the grievances filed by the other Plaintiffs. Plaintiffs have thus exhausted all administrative remedies. Since the union has indicated that its decision is fixed, any administrative remedies would be futile and are not required.

The Memorandum and Order of the District Court, dated June 18, 1991, states at page 18a of the Appendix:

> The record shows that the final disposition of the grievance heard in June by the Board was not accomplished by a Board decision in the manner contemplated in Article 17(E) of the Supplemental Agreement. There is no record that the committee ever returned to the board to argue or to support its recommendation, but rather the evidence suggests that the committee submitted the recommendation directly to the union and the company.(Fnt.12) It does not appear that any formal request to negotiate such an agreement was made by either signatory or that the procedures mandated by the Railway Labor Act, Section 156 for changing collective bargaining agreements were followed in its adoption.
>
> (Fnt.12)There is no written record of the Board's consideration of the recommendation as required in Article 17(M) of the Supplemental Agreement.

The June 18, 1991, District Court Memorandum and Order further states:

> It is undisputed that the proceedings and decision of the February Board conformed with Article 16 and therefore the Board which convened in June did not have the authority to settle the dispute before it. (at 19a)

Although the District Court found that "the Board which convened in June did not have the authority to settle the dispute

before it," the Court held the motions of the parties for summary judgment in abeyance. Further, the District Court granted Defendant Local 608, or any other Defendant sixty days in which to brief and submit to the Court any memoranda or evidence regarding apparent authority as to "whether the company and union representatives were authorized to create a 'side agreement' purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board ruling."

Defendants Teamsters International Union, Teamsters Local 608, and UPS, filed supplemental memoranda on August 19, 1991. Plaintiffs filed their motion for leave to respond to Defendants' supplemental memoranda, and duly filed their responses thereto.

On January 24, 1992, the Court entered its Memorandum and Order that the motion of the Plaintiffs for summary judgment against the Defendants be and is hereby denied; and further that the motion of the Defendants for summary judgment on the claims of the Plaintiffs against them be granted and Plaintiffs' claims be dismissed with prejudice. (Appendix 4a)

The District Court held that:

> The affiants attest to the local union officers' authority to negotiate binding amendments to the Flight Crewmember Supplemental Agreement to the CBA. Plaintiffs do not controvert the affidavits, but argue instead that even if the local union had authority to enter into binding side agreements, the members of the "joint company-union committee" who recommended the change in the contractual provision were "self-serving." Plaintiffs allegations' are not sufficient to withstand the defendants' motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). (Appendix 7a)

The District Court did not address, nor give weight to the pleadings, depositions, answers to interrogatories and admissions on file which clearly controverted Defendants' affidavits, which clearly showed that Plaintiffs' legal argument and the facts presented supported Plaintiffs' allegations that the union acted arbitrarily, discriminatorily, and in bad faith.

The District Court also failed to address the issue before it, that even if company and union representatives were authorized to create a side agreement purporting to interpret a provision of the Supplemental Agreement resolved previously by a System Board of Adjustment ruling, the procedures Defendants engaged in did not abide by the terms of the CBA, the provisions of the RLA, or the Union's duty of fair representation.

Plaintiffs appealed the decision of the District Court. The Sixth Circuit affirmed on January 5, 1993, holding that it found "no errors warranting reversal." (Appendix 1a)

I. THE DISTRICT COURT DECISION ENTERING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT WAS ARBITRARY AND IN ERROR AS A MATTER OF LAW BECAUSE IT FAILED TO ADDRESS THE ISSUE SET FORTH IN PLAINTIFFS' COMPLAINT AND IN THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT.

The Railway Labor Act forbids changes in pay, rules or working conditions contrary to the collective bargaining agreement and contrary to 45 U.S.C. § 156. (45 U.S.C. § 152, Seventh)

Article 2, Section 1 of the Master Agreement[9] states:

> No new Supplements, Riders or Addenda to this Agreement shall be negotiated by any of the parties hereto, unless otherwise agreed to by the Employer and the National Negotiating Committee. Any Supplement, Rider or Addendum not agreed to by the National Negotiating Committee will be null and void. (Emphasis added)

The "August Agreement" changing the terms of the Transition Letter of Agreement, clearly, was not ratified nor agreed to by the National Negotiating Committee and is not only null and void, it is in violation of the CBA which does not provide for a committee, of any number, or any make-up, to negotiate a change in contract language regarding pay, rules or working conditions.

Defendant Teamsters Union has stated that the August document was not an "Agreement", but was merely an investigation of all the "evidence compiled." (Deposition of William Ferchak, pp. 66, 68-69). UPS contends that the "August Agreement" was negotiated by the company and the union. (Deposition of Lee A. Wallace, p. 140). Regardless of how it is characterized, the "August Agreement" is invalid. The Collective Bargaining Agreement does not provide for a "joint company-union committee" to unilaterally and arbitrarily create new contract language, nor does it allow for secret company-union negotiations to change contract language.

Section 156 of the RLA sets forth certain procedures in changing rates of pay, rules and working conditions. These

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[9]The Flight Crewmembers Supplemental Agreement does not address the issue of riders or addenda to the contract.

include written notice of the intended change, and agreement between the representatives of the parties interested in such change as to the time and place for conferencing as to the intended change. Defendants neither complied with the terms of the CBA, nor the provisions of the RLA. Instead, they arbitrarily, discriminatorily and in bad faith, changed Plaintiffs' working conditions with the publication of the document entitled "August Agreement."

The issue that was placed before the District Court is whether the Union breached its duty of fair representation:

a) when it reconsidered the final and binding decision of the February System Board of Adjustment which definitively interpreted the contract language regarding seniority;

b) by calling a special June System Board to hear meritless and untimely grievances regarding a System Board Decision which was final and binding on all parties;

c) by referring those "new grievances" to a "joint company-union committee" of four crewmembers for resolution;[10]

d) by approving and signing the "recommendation" of the invalid "committee" as an agreement between the Company and the Union, which

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[10] A "joint company-union committee" is not an alternative provided for in the CBA, nor can it be found in the Railway Labor Act. When the Board cannot reach a decision by majority vote, it is bound by the terms of the contract to appoint an independent arbitrator. Decisions of the Board with the arbitrator are also final and binding on the parties. CBA Supplemental, Article 17, Section E.

"Agreement" arbitrarily and discriminatorily changed Plaintiffs' working conditions.

Plaintiffs have alleged and shown, and the District Court ruled, that the Board did reconsider its decision without having the power to do so. This lower court ruling gives rise to at least a triable issue of material fact as to the arbitrariness of that decision. Nonetheless, the court below erroneously held that the real issue was, "Whether company and union representatives were authorized to create a 'side agreement' purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board ruling." As Plaintiffs have argued, neither party could "reinterpret" the provision resolved by the February Board, that decision being final and binding on both parties. The only means by which the provision could be found to have another meaning was to change that provision! Defendants have admitted the language of the Transition Letter of Agreement was changed by the August Agreement. (Deposition of Neil Konietzko, p. 80)

The determination as to whether the company and union were cloaked with actual or apparent authority to change by "side agreement" the working condition provisions of the CBA, Supplement, or Transition Letter, is absolutely immaterial to the decision required of the District Court.

Even assuming, arguendo, that they were so authorized, the real question remains whether the procedure engaged in to effect those changes and amendments ultimately did or did not abide by the terms of the CBA, the provisions of the Railway Labor Act, and the unions' duty of fair representation to the Plaintiffs.

This issue, which is the basis of Plaintiffs' Complaint, was not addressed by the District Court.

II. PLAINTIFFS HAVE PRESENTED MATERIAL FACTS RAISING GENUINE ISSUES AS TO DEFENDANT TEAMSTERS UNION'S BREACH OF ITS DUTY OF FAIR REPRESENTATION.

On January 18, 1991, each of the four Defendants filed its Motion for Summary Judgment.

A. Defendant Teamsters International.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Teamsters International stated at page 22 that:

> The standard by which the Union shall be judged is whether it acted "arbitrarily, discriminatorily or in bad faith." Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975), reh'g denied, 528 F.2d 912 (1975); Ratkosky v. United Transportation Union, 843 F.2d 869, 876 (6th Cir. 1988).

Teamsters International further stated, at page 21, that:

> The Union did not participate in the committee's deliberations nor did the Union have any input into the criteria utilized which formed the basis for the recommendation. No record evidence exists to the contrary. As a result, Plaintiffs cannot meet their burden of showing that their allegation regarding the joint committee was "arbitrarily discriminatory or self-serving." More importantly, however, the Plaintiffs fail to show a connection to the Union which can even arguably rise to the level of unlawful conduct on the Union's part.

Clearly, this is an admission of the Union's abnegation of its responsibility but it does not relieve the Union of its duty to Plaintiffs. When a union's conduct is an abdication of the representative function that violates the duty of fair representation, it constitutes an unfair labor practice under the Act. Branch 6000 v. NLRB, 595 F.2d 808, 816 (D.C. Cir. 1979).

Although Defendant Union erroneously states at page 18, that neither the System Board of Adjustment nor the arbitrarily established joint "committee" "owe the Plaintiffs a duty of fair representation within the meaning of the Railway Labor Act as interpreted,"

> The union has responsibility as exclusive bargaining agent to formulate the employees' position on terms and conditions of employment. This responsibility may be delegated by the union membership...However, the delegatee, once selected, must in turn function as a representative for all the employees in the bargaining unit. If a representative's negotiating decisions are motivated solely by self-interest, then there is a breach of the duty of fair representation. The same result attains when the decisionmaking function is delegated to a group of employees with the understanding that their actions will be motivated solely by their own personal considerations. Id at 811-812.

Defendant Teamsters International concluded that "absent any showing...that the Union here acted on the basis of arbitrary factors such as race, personal animosity or sheer numbers of employees in a given group, it cannot be found to have breached its duty of fair representation." (At pages 26 and 27).

However, Plaintiffs have shown that precisely because of such political pressure from another, larger group of flight

crewmembers, the Union called a special June System Board of Adjustment meeting to hear these new grievances, referred the grievances to a special committee of four crewmembers, and accepted the "recommendation" of this committee of four crewmembers as the Union's own "negotiation" with the company regarding the issue of seniority. The rule announced in Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967), that a union breaches its duty of fair representation if its actions are either arbitrary, discriminatory, or in bad faith, applies to all union activity, including contract negotiation. By its conduct, the union clearly breached its duty to Plaintiffs, and violated the standards as set out in the 6th Circuit decisions in Ruzicka, and Ratkosky and the Supreme Court decision in Vaca v. Sipes, 386 U.S. 171 (1967).

B. Defendant Teamsters Local 608.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Teamsters Local 608 stated at page 19 that:

> It is well established that a claim of unfair representation requires a showing of bad faith, discrimination, or arbitrary conduct on the part of the Union. Ratkosky v. United Transportation Union, 843 F.2d 869, 876 (6th Cir. 1988), citing Vaca v. Sipes, 386 U.S. 171 (1967).

At page 24 of its Memorandum, Defendant Teamsters Local 608 stated that:

> After the February-March system board issued its decision, over 150 pilots signed a petition protesting the decision which was presented to the Union.

At page 25 of its Memorandum, Defendant Teamsters Local 608 stated that:

> Not only did representatives of those crewmembers who grieved the March decision appear and make lengthy presentations at the June hearing, but, at the Union's invitation, two crewmembers who made major presentations at the February-March hearing appeared and reiterated their presentations at the June hearing.[11]

Admitting, at page 31 of its Memorandum, that, "Employees have 'no absolute right to have [their] grievances taken to arbitration' by their Union Representatives, Vaca v. Sipes, 386 U.S. 171, 191 (1967); see also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976)," the union, nonetheless, acquiesced to a majority group and heard the new grievances at a special June System Board of Adjustment.

Admitting at page 27 that, "the Union and UPS incorporated the Committee's recommendation into what ultimately became the August Agreement," Teamsters Local 608 went on to categorize this action by the Union as a "reasonable and logical approach to the dispute." Nothing can be more unreasonable or illogical than the union's arbitrary and discriminatory conduct.

At page 26 of its Memorandum in Support of Motion for Summary Judgment, Local 608 stated that the dispute was "irreconcilable." In reality, the dispute had been reconciled by the February System Board. The Board's decision was consistent with the language of the collective bargaining agreement and was final and binding on all parties. Also, on page 26 of its Memorandum, Local 608 characterized the August 2, 1989, agreement, as a "compromise." The August agreement can hardly be considered a compromise, when all members of the "joint company union

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[11]These two union-invited crewmembers are the same two crewmembers the union appointed as "committee" members.

committee" benefitted from their "recommendation" at the expense of Plaintiffs.

The acceptance and implementation of such a biased agreement by Local 608 is clearly an arbitrary and discriminatory action made in bad faith.

C. Defendant UPS.

In its Memorandum in Support of Motion for Summary Judgment, Defendant UPS stated at page 23 that:

> The standard by which Local 608's conduct is to be measured has been set forth by the Sixth Circuit Court of Appeals in Ratkosky v. United Transportation Union, supra. In order to establish a breach of the duty of fair representation, Plaintiffs must make "a showing of bad faith, discrimination, or arbitrary conduct on the part of the union."

Defendant UPS further stated at page 25 that:

> Over one hundred and fifty crewmembers who had been moved down on the seniority lists filed a petition protesting the March 9, 1989 System Board decision as being contrary to the contract and to what they had been told when hired.
>
> Neil Konietzko and William Ferchak decided to call a special System Board of Adjustment to hear the grievances which protested the March 9, 1989 System Board decision. (Konietzko, page 31.)

D. Defendant Independent Pilots Association.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Independent Pilots Association stated at pages 4 and 5 that:

> Initially, a four member System Board composed of Company and Union members agreed with this interpretation and sustained the grievances. UPS Exh. 10.
>
> The decision required reconfiguration of seniority placement and, naturally, provoked grievances from adversely affected pilots. Indeed, over one hundred grievances were filed against the System Board's decision. Grahn Dep. 68.

Although admitting that a decision of the February System Board regarding seniority would "naturally provoke grievances from adversely affected pilots," the fact that over 100 grievances were filed, is suggested by Defendant IPA to be the significant factor as to why the Union breached its duty of good faith toward Plaintiffs and arbitrarily and discriminatorily changed the contract language.

Union Trustee William Ferchak, when asked in his deposition what evidence he relied on in adopting the August Agreement, replied that he relied on the letters from the four contract negotiators[12] and the recommendations of the committee. (Ferchak deposition, pages 47-49.) Ferchak also testified at pages 43-45 of his deposition that he considered Greene's letter as improper evidence, doubted the credibility of Landsman's

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[12]The four contract negotiators were Richard Greene, Peter Landsman, Bill Reid and Bill Mann (former IPX employees, who held the first 25 seniority numbers.

testimony, and felt that Mann "at that particular time was under a lot of duress because the rank and file was getting on him for the contract and some other things that he had done, so I couldn't put too much stock into any of them, to be very truthful." Yet, in spite of this improper evidence and non-credible testimony, the Union Trustee, William Ferchak, issued the August Agreement in conjunction with the employer, UPS, which, (as admitted by the Defendant UPS) changed the contract language and the working conditions of the Plaintiffs. To allow four crewmembers, not authorized by the contract, and with self-serving interests to "weigh" the decision of the February System Board was an abdication of the Union's representative function and clearly violated the duty of fair representation. This constitutes an unfair labor practice.

Although both Plaintiffs' Complaint and the Defendants' Motions for Summary Judgment all dealt with the issue as to whether the Union breached its duty of fair representation and whether the Company breached the collective bargaining agreement, the District Court in its Memorandum and Order of June 18, 1991, granted Defendant Local 608, or any other Defendant sixty days in which to brief and submit to the Court any memoranda or evidence regarding an entirely different issue, the apparent authority as to "whether the company and union representatives were authorized to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a Board ruling." All Defendants responded to the invitation of the District Court. Plaintiffs filed a motion for leave to respond to the submitted memoranda.

This side issue, newly presented by the District Court, in no way supersedes the issues in Plaintiffs' Complaint and the issues before the Court; breach of duty of fair representation, breach of the CBA. However, in its Order of January 24, 1992, granting Defendants' Motion for Summary Judgment against the Plaintiffs and denying Plaintiffs' summary judgment against the Defendants, the District Court disregarded the pleadings,

depositions, answers to interrogatories, and admissions on file regarding the issues of bad faith and breach of contract. The Court held that Plaintiffs did not controvert Defendants' affidavits regarding the extraneous issue of the Union's authority to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a System Board of Adjustment ruling.

The District Court did not address the issue of whether the procedures the Defendants engaged to effect such changes, if indeed they were authorized to make them, did or did not abide by the terms of the collective bargaining agreement, the provisions of the Railway Labor Act, and a union's duty of fair representation.

III. THE DISTRICT COURT DID NOT ADDRESS THE ISSUE BEFORE IT BUT INSTEAD DISMISSED PLAINTIFFS' COMPLAINT BASED ON AN ISSUE IRRELEVANT TO THE CASE.

The issue before the Court was whether Defendant Union breached its duty of fair representation and whether Defendant UPS breached the collective bargaining agreement.

Clearly, the Court misunderstood or misinterpreted the issues. The Complaint alleges and the parties' Motions for Summary Judgment argue the issue of whether the Union breached its duty of fair representation and whether the company breached the collective bargaining agreement. The new "issue" presented by the District Court is irrelevant to the Complaint and to the Motions for Summary Judgment before it.

Plaintiffs maintain that even if the Union had the authority to reconsider a final and binding decision, or whether the company and the union representatives were authorized to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a Board ruling, the issue placed before the Court is whether the procedures engaged in by the

Defendants to effect such changes and amendments ultimately did or did not abide by the terms of the collective bargaining agreement, the provisions of the Railway Labor Act, and a union's duty of fair representation regarding contract changes.

Citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986), the District Court held that Plaintiffs' allegations are not sufficient to withstand the Defendants' motion for summary judgment. However, the Court does not identify to which allegations it refers. The allegations in the Complaint, the allegations in Plaintiffs' Motion for Summary Judgment, the allegations in Plaintiffs' Response and Objection to Defendants' Motions for Summary Judgment, or Plaintiffs' Response to Defendants' Supplemental Memoranda and Evidence regarding the issue of apparent union authority to enter into binding side agreements.

In Anderson v. Liberty Lobby, Inc., 477 U.S. at page 248, regarding the issue as to materiality, the court held that:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, Section 2725, pp 93-95 (1983).
>
> ...More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

In the present action, Plaintiffs allege that the Union breached its duty of fair representation and the company breached the collective bargaining agreement. Defendants filed a motion for summary judgment arguing that the Union's action was not arbitrary, discriminatory or in bad faith. As nonmoving or adverse parties, Plaintiffs responded, based on the pleadings, depositions, answers to interrogatories, and admissions on file, showing that there is indeed a genuine issue as to material fact and that the moving parties, Defendants Union and company, are not entitled to summary judgment as a matter of law.

In Anderson, the Supreme Court held that, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

The court in Anderson further stated at page 255 that:

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S., at 158-159, 26 L.Ed.2d 142, 90 S. Ct. 1598. Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason

Co., 334 U.S. 249, 92 L.Ed. 1347, 68 S. Ct. 1031 (1948).

The Court of Appeals issued its affirming decision on January 5, 1993, stating only that, "having carefully reviewed the record and the issues presented in the appellate briefs and the arguments of counsel, we find no error warranting reversal."

In Anderson v. Liberty Lobby, Inc., a libel action brought by a public figure, Plaintiff was required under the first amendment to prove by clear and convincing evidence that the defendant acted with actual malice. The court held that:

> ...[A] court ruling on a motion for summary judgment must be guided by the New York Times "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists - that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

In the present action, Plaintiffs allege that the Defendant union breached its duty of fair representation and the Defendant employer breached the collective bargaining agreement. The evidentiary standard in determining whether a genuine issue of breach of duty and breach of contract exists is whether the union acted arbitrarily, discriminatorily, or in bad faith and whether the Company's actions were contrary to the terms of the CBA.

The District Court did not address the issue before it, but instead, ruled on an "issue" irrelevant to the case, and dismissed

Plaintiffs' Complaint based on that erroneous ruling. Plaintiffs appealed the decision of the District Court.

The issue before the Court now is whether the Court of Appeals, in affirming the District Court decision, did or did not apply the correct standard in reviewing the District Court's grant of summary judgment.

CONCLUSION

For these reasons, a Petition for a Writ of Certiorari should therefore be granted, and this Court should vacate the decision below, and remand the case for further proceedings in light of the stated issues before the District Court.

Respectfully submitted,

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